



The MDU's guide to the combined NHS and social care complaints procedure

An introduction to the NHS and social care complaints procedure

A new NHS and social care complaints procedure was introduced in England on 1 April 2009. The local resolution stage of the new procedure is governed by regulations: *The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009*.

Responsible bodies

The complaints procedure applies to NHS bodies (including NHS trusts, SHAs, PCTs and foundation trusts), all providers of NHS health care (including primary care providers) and to 'independent providers', that is voluntary and independent sector organisations providing 'health care in England under arrangements made with an NHS body'. It also applies to adult social services functions of local authorities. These are all identified as 'responsible bodies' in the regulations.

The complaints procedure has two stages

- 1. Local resolution** – for example, within the practice, Primary Care Trust (PCT) or hospital. In the MDU's experience most complaints are resolved quickly and efficiently this way (see *Medico-legal Guide 1.2 – local resolution*).
- 2. Parliamentary and Health Service Ombudsman** – the second stage, when a complainant remains dissatisfied with the initial stage of the process. Doctors who are the subject of a complaint can also complain to the Ombudsman, for example if they are not satisfied with a

response provided on their behalf by a PCT. (see *Medico-legal Guide 1.4 – Parliamentary and Health Service Ombudsman*).

Complaints do not need to be made to the provider

Complaints can be made to the organisation providing care (for example hospital or GP surgery) or direct to the commissioning body (usually the PCT). If a PCT receives a complaint about a provider, and the PCT considers that it can deal with the complaint, it must seek consent from the complainant so that it can send details of the complaint to the provider. On receiving consent, the details must be sent as soon as possible. If, however, the PCT considers it more appropriate for the provider to answer the complaint, and the complainant consents, the complaint can be passed to the provider for a response.

Complainants must choose at the outset whether to make a complaint to a primary care provider or the PCT. A complainant who makes an initial complaint to a provider and who does not agree with the provider's response cannot then seek a review from the PCT. Complainants who are dissatisfied with the response they receive from a primary care provider can refer the complaint to the Ombudsman.

If a complaint is made to any responsible body (the first body), which considers that the complaint should have been made to another responsible body (the second body), and the first body sends the complaint to the second body; the second body can respond to the complaint as if it had received it first. The second body must acknowledge the complaint within three working days.

Complaints excluded from the procedure

The complaints procedure excludes:

- Complaints made by one NHS body against another
- Complaints made by employees in relation to their work for an NHS body
- Complaints that were first made orally and which were resolved to the complainant's satisfaction within one working day
- Complaints about the same subject matter as a complaint that has previously been made and resolved
- Complaints alleging failure by a public body to comply with a request for information under the Freedom of Information Act 2000.
- Complaints about care solely provided by the independent healthcare sector, which has its own procedures.

If a responsible body considers that it is not required to consider a complaint, it must inform the complainant in writing of the decision and the reasons for it.

The complainant

Complainants should normally be current or former patients or nominated representatives, which can include a solicitor or a patient's elected representative, for example an MP.

Never assume that someone complaining on behalf of a patient has authority to do so. The investigation of a complaint does not remove the need to respect a patient's right to confidentiality. Patients over the age of 16 whose mental capacity is unimpaired should normally complain themselves. Children under the age of 16 who are able to do so may also make their own complaint.

If someone other than the patient makes a complaint, you will need to make sure they have authority to do so. If patients lack capacity to make decisions for themselves, the representative must be able to demonstrate sufficient interest in their welfare and be an appropriate person to act on their behalf. This could include a partner or relative or someone

appointed under the Mental Capacity Act 2005 with lasting power of attorney. If the power of attorney covers the person's welfare, this could include making complaints at a time when that person lacks capacity.

In certain circumstances, the regulations impose a duty upon the responsible body to satisfy itself that a representative is an appropriate person to make a complaint. For example, if the complaint is about a child, the responsible body must satisfy itself that there are reasonable grounds for the representative to make the complaint, and not the child concerned. If the patient is a child or a patient who lacks capacity, the responsible body must also be satisfied that the representative is acting in the best interests of the person on whose behalf the complaint is made. If the responsible body is not satisfied that the representative is appropriate, it must not consider the complaint and must give the representative reasons for the decision in writing.

Time limits

The regulations require a complaint to be made within 12 months from the date on which the matter occurred, or from when the matter came to the attention of the complainant. The regulations state that a responsible body should consider a complaint outside that time limit if the complainant has good reason for not making the complaint within that limit and, despite the delay, it is still possible to investigate the complaint fairly and effectively. The MDU generally advises members to consider complaints made outside the time limit if it is possible to investigate them. If there are any difficulties, for example if the relevant information is no longer available, it would be advisable to discuss this with complainants as soon as possible so they know what steps, if any, can reasonably be taken to investigate a complaint outside the time limit.

While the regulations do not set timescales for the procedure itself, they do require a timely, appropriate response. If a response is not provided within six months from the date the complaint was made, or a later date if one was agreed with the complainant, the complaints manager has to write to the complainant and explain why it is delayed. The complaints manager must ensure the complainant receives a response as soon as possible.

Saying sorry

In the MDU's experience patients who complain often want one or more of the following:

- a thorough investigation and explanation of what happened and why
- assurance it won't happen again
- an apology – a sincere expression of regret

This is acknowledged in the GMCs' guidance in paragraph 31 of *Good Medical Practice*:

'Patients who complain about the care or treatment they have received have a right to expect a prompt, open, constructive and honest response including an explanation and, if appropriate, an apology. You must not allow a patient's complaint to affect adversely the care or treatment you provide or arrange.'

The MDU advises members to apologise where appropriate. For many years we have said that, if something goes wrong, patients should receive a prompt, open, sympathetic and above all truthful account of what has happened. Any patient who has had the misfortune to suffer through an error of whatever nature should receive a full explanation and a genuine apology. We encourage members to adopt this approach. There are no legal concerns about taking this course of action: it is quite different from admitting liability.

Disciplinary and criminal procedures

The complaints procedure is a means for addressing patient complaints and does not have a disciplinary function. Inevitably some complaints will identify matters that suggest a need for disciplinary investigation. This might result in action via local procedures or referral to the practitioner's regulatory body. Complainants have no role in decisions to initiate disciplinary investigations (though they can refer serious concerns directly to the GMC or other regulatory body). Where disciplinary action is contemplated against a doctor who is the subject of a complaint, the two processes should be treated entirely separately. Disciplinary procedures are confidential between an employer and employee, or a contracting body and a contractor, and complainants

have no right to know the details or the outcome of such procedures.

It may be possible for investigation of the complaint to continue at the same time as the disciplinary investigation, but if there is any question that the rights of the doctor under investigation may be prejudiced, please seek advice from the MDU.

In very rare cases a complaint might relate to a matter under police investigation. Given that investigation of the complaint might prejudice the police investigation and possibly the rights of the doctor, members are advised to contact the MDU for advice.

Negligence claims

The regulations do not require a complaint to be stopped if there is a claim for negligence. It is the MDU's view that in many cases it could be appropriate to continue with a complaint investigation and response even if there is a claim. If complainants are provided with a response setting out full details of the investigation and conclusions reached, this may help them and their legal adviser to decide whether there has been negligence. Members should contact the MDU if they are informed of a claim at the same time as they are involved in an investigation of a complaint.

How the MDU can help?

The MDU has extensive experience of assisting members with complaints and we can help with both stages of the complaints procedure. We can assist members to draft initial responses to complaints and, on the rare occasions that complaints are referred to the Ombudsman, we can also support members with this procedure.

As always, members are encouraged to phone the MDU's 24-hour advisory helpline to speak to one of our medico-legal advisers.

Principles of Good Complaint Handling

In November 2008, the Parliamentary and Health Service Ombudsman (the Ombudsman) published a booklet, *Principles of Good Complaint Handling*. This booklet sets out six key principles that the Ombudsman considers are central to good complaints handling. The Ombudsman expects to see these principles applied to complaints handling by all public bodies, including NHS bodies and organisations providing NHS services. It is perhaps not surprising that much of the Ombudsman's advice about claims handling is similar to the advice the MDU has provided to members over the years and that we continue to provide in this series of leaflets. The Ombudsman makes it clear that the principles in the booklet set out the approach the Ombudsman's office will take when considering complaints referred to it.

The principles are:

- 1) Getting it right**
- 2) Being customer focused**
- 3) Being open and accountable**
- 4) Acting fairly and proportionately**
- 5) Putting things right**
- 6) Seeking continuous improvement**

If you are responding to a complaint, you may wish to look at the Ombudsman's booklet in conjunction with the MDU's guidance. It can be found in the Publications section at: <http://www.ombudsman.org.uk>

For individual medico-legal advice:

24-hour advisory helpline 0800 716 646

Email: advisory@the-mdu.com

Web: www.the-mdu.com